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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

BRETT WAGNER,

Plaintiff and Appellant,

v.

HOUDINI'S MAGIC SHOP, INC.,

Defendant and Respondent.

A132251

(San Francisco City & County  
Super. Ct. No. CGC-10-497071)

Plaintiff Brett Wagner sued his former employer, defendant Houdini's Magic Shop, Inc., for violation of employment laws. His lawsuit included four class action causes of action, based on allegations of reduction of actual time worked for purposes of wage calculations and improper allocation of restroom use to mandatory 10-minute rest breaks. Plaintiff moved to certify three classes of current and former employees. The trial court denied class action certification, finding that individual questions predominated over common ones. Plaintiff contends the trial court erred. We affirm because of a lack of community interest among the alleged class members.

**I. FACTS**

Defendant Houdini's Magic Shop, Inc. (Houdini) is a Nevada corporation with its headquarters and principal place of business, presumably retail stores, in Las Vegas. At the time this lawsuit was filed, it had one retail store in California, at Pier 39 in San Francisco. In the three-year period involved in this action, Houdini employed about 35 employees at the Pier 39 store, both part and full time. The store generally employed between five to seven employees in any given week.

Houdini hired plaintiff Brett Wagner (Wagner) to work in its Pier 39 store as a Magician/Sales Person on March 16, 2008. On November 7 of that year, Wagner became the store manager. There had been three different managers between March 16 and November 7, 2008. Houdini terminated Wagner's employment on March 26, 2009.

On February 23, 2010, Wagner filed a complaint against Houdini alleging 13 causes of action. The first four are class action allegations, while the remaining nine—which include wrongful termination and retaliation—are personal to Wagner. Of primary concern are the first and third causes of action—the second and fourth are merely derivative.

The first cause of action is for nonpayment of wages under Labor Code section 204. Wagner alleged that Houdini required its Pier 39 store employees to use a computer time-keeping system to clock in and clock out, and that the employees worked from the clock-in time to the clock-out time with the exception of meal and rest breaks, which were paid time periods. Wagner further alleged that Houdini paid its Pier 39 employees every two weeks, but when calculating time worked for purpose of payment of wages “arbitrarily reduced the time clocked by the employees’ use of the computer system in varying amounts for each workday of each employee.” Houdini supposedly did not explain this alleged practice, which resulted in underpayment of wages earned.

The third cause of action is for failure to provide 10-minute rest periods for every four hours worked, in a rest area separate from toilet rooms, in violation of sections 12 and 13 of Industrial Welfare Commission wage order #7-2001 (Cal. Code Regs, tit. 8, § 11070). Wagner alleged that the Pier 39 store did not have a toilet facility, so employees had to leave the store and use the public restrooms on Pier 39. Wagner further alleged that Houdini required the employees to use their 10-minute rest breaks for going to and from and using the public restrooms, and thus deprived them of their rest periods.

Wagner moved to certify two classes of nonexempt employees of Houdini's Pier 39 store from February 23, 2007 to the present: (1) those whose total clocked time, as measured by clocking in and clocking out on the computerized time-keeping system, was

reduced before payment of wages; and (2) those who were required to use any portion of a workday rest period when seeking to use the toilet.<sup>1</sup>

Wagner supported his motion primarily with his own declaration. He stated the store employees did not have access to any records of clocking-in or clocking-out times on the computerized system, and that no such records, including any reductions of total clocked time, were maintained at the store.

Wagner acknowledged there were written Weekly Sign-In Sheets on which each employee was expected to sign in before the first shift of that week. But Wagner said it was generally understood the Weekly Sign-In Sheets were only a prospective work assignment schedule for the week. He said he was never told or instructed that employees were to change the times in the Weekly Sign-In Sheets to get paid for their total clocked time. In fact, one of his managers told him never to change the time on those sheets.

Wagner declared that it was his initial understanding wages were calculated solely from the total clocked time on the computerized system. Around the time he became manager, “it . . . became evident [Houdini] calculated wages in some other manner.” Wagner admitted, “today I still do not know how [wages] were calculated[.]” But he claimed he “was not paid for all the time worked, and was not always paid for the total clocked time, but instead was paid for some reduction of it.”

With regard to rest breaks, Wagner declared that throughout his employment it was “[Houdini’s] policy, practice and procedure [to] instruct[] and require[] its employees to use their 10-minute rest periods . . . to access toilet facilities . . . and to return within the ten-minute break period.” This policy was communicated orally. According to Wagner, when an employee asked to go to the toilet, he or she was told to “take your ten,” meaning to use their rest period for their toilet visit. If the employee was gone longer than 10 minutes they were often reprimanded for being late.

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<sup>1</sup> Wagner moved to certify a third class which is not at issue in this appeal. Wagner’s opening brief discusses only the two classes described in the text.

Houdini opposed the motion for class certification. Its primary argument was that individual questions predominated over common ones, so that the requisite community of interest for a class action was lacking.

Houdini supported its motion with a declaration of Penny Munari, Houdini's Operations Manager throughout the three-year period of the lawsuit. Her duties included managing the operations of the Pier 39 store. She oversaw the timekeeping and payroll functions of Houdini, and was very familiar with Houdini's policies and procedures regarding how employees record their time worked, how Houdini ensured that hours worked were recorded, and how payroll was prepared from the timekeeping records. She was familiar with Houdini's record keeping and payroll processes, as well as Houdini's Employee Handbook and the policies contained therein. She also supervised the company payroll clerk. She declared that Houdini's payroll for hourly employees "is determined by a careful process to ensure that all hours worked were compensated in accordance with the agreed rates of pay."

Munari described the timekeeping and payroll processes at the Pier 39 store at some length. The timekeeping process is as follows.

**The Weekly Sign-In Sheet.** Employees are required to write down the hours worked per day in a given week on the Weekly Sign-In Sheet. They are required to sign this timesheet to verify the accuracy of the hours recorded. The store managers, including Wagner, were required to make sure the Weekly Sign-In Sheet was accurately filled out and signed. The Weekly Sign-In Sheet was then faxed to Munari's office in Las Vegas, Nevada, where the payroll calculations were performed.

**The Weekly Timesheet.** In addition to the Weekly Sign-In Sheet, Houdini used a computerized time clock, which was intended as an "oversight to the Weekly Sign-In Sheet." Each employee was required to punch in at the beginning of each shift and punch out at the end.<sup>2</sup>

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<sup>2</sup> Houdini also kept daily sheets recording rest and meal breaks.

The timekeeping process was described in the Employee Handbook, which advised employees to draw the attention of the Payroll Department to any error in the amount of pay received.

Munari described the payroll preparation process as follows. The Weekly Sign-In Sheets, signed by each employee to verify their accuracy, were considered the primary record of hours worked. The Weekly Sign-In Sheets were compared to the hours recorded by the computerized time clock, reflected in the Weekly Timesheets. If there was a material discrepancy between the two, “conversation typically would occur between the person preparing the payroll, and the employee or manager at Pier 39, in an effort to accurately calculate the hours worked.” If a daily total or hours worked contained a fraction of an hour, the fraction was rounded to the nearest quarter hour. Notes of the payroll calculations, i.e., the payroll clerk’s analysis of the timekeeping records and any rounding, are typically written on the face of the Weekly Timesheet.

Munari also declared that “there is no company policy prohibiting employees from using the restroom, if needed, at times other than during rest periods. In the event that only one person is in the store, [Houdini] supplies a ‘will return’ sign, for hanging on the door, in the event of a temporary absence.”

Houdini also presented the declaration of R.J. Owens, who had been the manager of the Pier 39 store since June 2009. In all his time with the company, it had been the policy and practice for employees to write down their daily hours worked on the Weekly Sign-In Sheet, and then sign the Weekly Sign-In Sheet to verify the accuracy of the hours stated. As manager, it was part of his job to make sure the employees accurately recorded their hours worked. Owens declared that Houdini did not restrict employees to using the restroom only on 10-minute rest breaks, and employees are free to use the restroom as needed. Owens stated he had been paid all wages he was owed for hours worked at the store.

Finally, Houdini presented the declarations of two current employees of the Pier 39 store, Donald A. Fineout and Charles G. Martin. Both declared they accurately recorded their hours worked on the Weekly Sign-In Sheet. Both declared they have

never been prevented from using the restroom at times other than their 10-minute rest breaks; have never been told they could only use the restroom during such breaks; and regularly used the restroom at times other than their 10-minute rest breaks. Both saw Wagner receive permission “on many occasions” to use the restroom when he was not on break. Fineout was not aware of any instance of not being paid all wages owed for his hours worked; Martin believed he had been paid all wages owed him.

In a supplemental declaration, Wagner restated his contention regarding the use of the 10-minute rest break for restroom use. He stated that when he started working at the store he would sign the Weekly Sign-In Sheet at the beginning of the workweek, and it was generally regarded as a work schedule for the upcoming week and was not to be altered. After he became manager, Fineout and another employee complained of reduced wages, and Wagner and Fineout started changing the times on the Weekly Sign-In Sheet to the clocked in/out times with “mixed results.” Between November 2008 and March 2009, when he was terminated, Wagner “went back and forth” between changing and not changing the times on the Weekly Sign-In Sheet to the clocked in/out times. He “was never clear on whether it made a difference or not.”

At the hearing on the motion for class certification, the trial court spoke of the claim of reduced wages: “[t]he way I understand the policy . . . works is that there’s . . . an individual discussion that takes place with the individual employee to determine what’s the accurate measurement. So that involves an individual discussion. And there’s no policy that has been articulated by which the employee automatically gets hit with the lowest number. And who’s to say the lowest number isn’t more accurate, anyway?

“It does involve an individual examination of each individual employee’s time sheets compared to the others to see, number one, was there an adjustment made at all from the sign-in sheet that was signed? And, if so, on what basis? And did the employee agree with it or not agree with it? What if all the employees all agree with it?”

The court also indicated it had determined the rest-break issue “would appear to be an individual matter requiring particularized individual evidence.”

The trial court denied Wagner’s motion for class certification in a written order: “Based upon the evidence presented by both sides, the Court finds that [Wagner] has not demonstrated that the common issues in this case predominate over the individual issues, so as to support certification of the matter as a class action.”

With regard to timekeeping and payroll processing, the trial court noted that Houdini contended the Weekly Sign-In Sheets were the primary timekeeping record and if there was a discrepancy between those timesheets and the computerized time clock records, “there would be a discussion between the manager and the employee to determine the accuracy of the hours worked.” The court noted that Wagner relied only on his own declaration, not those of any other employee, and admitted “that he still does not know how the wages were calculated.” The court concluded that “a resolution of this issue, if it existed for other employees, would necessitate an individual review of the timekeeping records for each involved employee.”

With regard to rest breaks, the trial court noted that Houdini denied any policy to require employees to combine their 10-minute rest breaks with restroom use, and noted that the declarations of Fineout and Martin established that Wagner himself used the restroom at times other than his 10-minute rest break. “Again, if any manager did tell an employee to combine a bathroom break with a ten minute rest break, it would be an individual matter requiring individual, personalized proof.”

The court concluded that “the evidence presented by both sides demonstrates that resolution of any alleged common issues would require mini trials inquiring into the circumstances of each individual’s experiences.”

## **II. DISCUSSION**

We review the denial of a motion for class certification for abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326–327 (*Sav-On Drug Stores*)). Generally, a certification order will not be disturbed on appeal unless it is not supported by substantial evidence, it rests on improper criteria, or it rests on erroneous legal assumptions. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.)

The prerequisites for a class action are well-known: “the existence of an ascertainable class and a well-defined community of interest among the class members. [Citation.]” (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) In turn, the community of interest requirement “embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.]” (*Ibid.*; see *Sav-On Drug Stores, supra*, 34 Cal.4th at p. 326.)

As the trial court found, the present case is inappropriate for a class action because common questions of fact and law do not predominate. “[A] class action cannot be maintained if each individual’s right to recovery depends on facts peculiar to that individual.” (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 809.) Here, any question of reduced wages based on reduced hours of work, as well as any intrusion upon the rest breaks by restroom use, would be individual to each employee. The trial court’s findings in that regard are supported by substantial evidence. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 283, pp. 369–373.)

The trial court applied the proper criteria and did not make erroneous legal assumptions. The court looked for elements of commonality and common proof that would make this matter amenable to a class action approach. It found a lack of overall, uniform policies regarding time and payroll computation and restroom breaks, and concluded the matter required individualized inquiries and proof. Thus, the court applied the correct criteria to ascertain this case should not be certified as a class action. (See, e.g., *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732 [different treatment of employees would cause a proposed class action to “ ‘[s]plinter into individual trials’ ”] and *Dunbar v. Albertson’s Inc.* (2006) 141 Cal.App.4th 1422.)

Wagner contends the trial court used improper criteria, and followed improper reasoning, because it considered Houdini’s “unpled defenses.” Apparently, Wagner argues the trial court could not consider Houdini’s evidence in opposition to the motion for class certification, but was limited to the allegations of Wagner’s complaint and his declaration. It is true, as Wagner notes, that trial courts generally look to the plaintiff’s

complaint to determine the theory of recovery and whether it is analytically amenable to class treatment. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 327.) But trial courts routinely consider evidentiary matters in making the ultimate determination of class certification. (See, e.g., *id.* at pp. 328–332 [trial court considered numerous items of evidence, including 51 declarations from defendant]; *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 827–829.)<sup>3</sup>

The evidence properly before the trial court clearly shows that individual questions of proof predominate. Thus, the trial court did not abuse its discretion by denying class certification.

### III. DISPOSITION

The order denying class certification is affirmed.

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Marchiano, P.J.

We concur:

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Dondero, J.

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Banke, J.

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<sup>3</sup> In light of this conclusion, we need not respond point-for-point to the detailed arguments of the opening brief. Also, we need not address Houdini’s plausible claim that Wagner has waived any “unpled defenses” claim by failing to raise it below or object to Houdini’s evidence. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384–385.) Finally, we note Wagner’s claim the trial court relied upon a theory of “waiver of right to further wages” is not borne out by the record.